

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

DEBORAH ANN STONE,

NO. C10-713-RSL-JPD

Plaintiff,

v.

REPORT AND
RECOMMENDATION

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Plaintiff Deborah Ann Stone appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her applications for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that the Commissioner’s decision be REVERSED and REMANDED.

I. FACTS AND PROCEDURAL HISTORY

At the time of the administrative hearing, plaintiff was a thirty-seven-year-old woman. Administrative Record (“AR”) at 688. She graduated from high school, and has completed some college business school courses. AR at 689. Plaintiff was last gainfully employed from 1997-1998 as a photographer for Sears. AR at 61, 103, 710.

1 Plaintiff asserts that she is disabled due to HIV infection, back pain, migraines,
2 depression, and anxiety. AR at 56. In addition to these alleged impairments, plaintiff testified
3 regarding intermittent seizure-like episodes, hand and leg numbness, hand and leg pain with
4 tremors, and side effects from medication such as chronic diarrhea and fatigue. AR at 67-74;
5 688-714. Plaintiff's alleged onset date is October 1, 2003. AR at 62-65.

6 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 51,
7 56. Plaintiff requested a hearing, which took place on December 13, 2007. AR at 688. On
8 February 7, 2008, the ALJ issued a decision finding plaintiff not disabled and denied benefits
9 based on his finding that plaintiff could perform a specific job existing in significant numbers
10 in the national economy. AR at 26-27.

11 After reviewing additional evidence, the Appeals Council denied plaintiff's request for
12 review, making the ALJ's ruling the "final decision" of the Commissioner as that term is
13 defined by 42 U.S.C. § 405(g). AR at 5-8. On May 3, 2010, plaintiff timely filed the present
14 action challenging the Commissioner's decision. Dkt. 3.

15 II. JURISDICTION

16 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
17 405(g) and 1383(c)(3).

18 III. STANDARD OF REVIEW

19 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
20 social security benefits when the ALJ's findings are based on legal error or not supported by
21 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
22 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
23 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
24 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750
25 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
26 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,

53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

As the claimant, Ms. Stone bears the burden of proving that she is disabled within the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

1 The Commissioner has established a five step sequential evaluation process for
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
7 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
8 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
9 or more medically severe impairments, or combination of impairments, that limit her physical
10 or mental ability to do basic work activities. If the claimant does not have such impairments,
11 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
12 impairment, the Commissioner moves to step three to determine whether the impairment meets
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
15 twelve-month duration requirement is disabled. *Id.*

16 When the claimant’s impairment neither meets nor equals one of the impairments listed
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work
20 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
21 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is
22 true, then the burden shifts to the Commissioner at step five to show that the claimant can
23 perform other work that exists in significant numbers in the national economy, taking into
24 consideration the claimant’s RFC, age, education, and work experience. 20 C.F.R. §§

25 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
26 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R.
§ 404.1572.

404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

V. DECISION BELOW

On February 7, 2008, the ALJ issued a decision finding the following:

1. The claimant has not engaged in substantial gainful activity since March 15, 2005, the application date.
2. The claimant has the following severe impairments: HIV infection with medication side effects.
3. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
4. After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform the full range of light work.
5. The claimant is unable to perform any past relevant work.
6. The claimant was born on XXXXX, 1970² and was 34 years old, which is defined as a younger individual age 18-49, on the date the application was filed.
7. The claimant has at least a high school education and is able to communicate in English.
8. Transferability of job skills is not material to the determination of disability because applying the Medical-Vocational Rules directly supports a finding of "not disabled," whether or not the claimant has transferable job skills.
9. Considering the claimant's age, education, work experience, and residual functional capacity, there are jobs that exist in significant numbers in the national economy that the claimant can perform.
10. The claimant has not been under a disability, as defined in the Social Security Act, since March 15, 2005, the date the application was filed.

² The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

AR at 18-27.

VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Whether the ALJ erred in evaluating the severity of plaintiff's mental impairments and migraines at step two?
2. Whether the ALJ erred in evaluating the medical opinions of examining psychologist, Dr. Lind?
3. Whether the ALJ erred in evaluating the medical opinions of the State Agency Medical Consultants?
4. Whether the ALJ erred in assessing plaintiff's residual functional capacity (RFC) at step four?
5. Whether the ALJ erred in evaluating plaintiff's credibility?
6. Whether the ALJ erred in evaluating the lay witness testimony of plaintiff's boyfriend, Joseph Cameron, and daughter, Michaela Stone?
7. Whether the ALJ erred at step five by failing to elicit vocational expert testimony to determine whether any jobs existed in significant numbers in the national economy that plaintiff could perform?

See Dkt. 13 at 3-4; Dkt. 15 at 1-2.

VII. DISCUSSION

A. The ALJ Erred In Evaluating Plaintiff's "Severe" Impairments At Step Two

Plaintiff contends that the ALJ erred in determining plaintiff's "severe" impairments at step two "because he only considered Plaintiff's anxiety when assessing her limitations in the four essential areas of functioning, and he failed to consider plaintiff's depressive disorder" either singly, or in combination with her anxiety. Dkt. 13 at 6-10; Dkt. 16 at 5. In addition, plaintiff asserts that "the ALJ did not provide any reasons at step 2 for disregarding Plaintiff's migraine headaches" as a severe physical impairment. Dkt. 13 at 15; *see* Dkt. 16 at 4.

The Commissioner acknowledges that plaintiff's treating physician, Scott Blaker, M.D., diagnosed plaintiff with depression, but argues that "the evidence that was available supported

1 the ALJ's finding that none of Plaintiff's alleged mental impairments imposed more than
2 minimal limitations during the relevant period." Dkt. 15 at 5. With respect to plaintiff's
3 migraines, the Commissioner denies any error by the ALJ because "[t]he ALJ noted that
4 Plaintiff reported experiencing migraine headaches." Dkt. 15 at 6.

5 Step two of the sequential evaluation process requires a claimant to prove that he has a
6 severe impairment or combination of impairments. 20 C.F.R. § 404.1520(c), 416.920(c). An
7 impairment is severe if it significantly limits the plaintiff's ability to perform basic work
8 activities.³ 20 C.F.R. § 404.1521(a), 416.921(a). When an impairment or combination of
9 impairments consist of no more than a slight abnormality that have only a minimal effect on an
10 individual's ability to work, a finding of non-severe is appropriate. *Smolen*, 80 F.3d at 1290
11 (internal citations omitted); *see also* SSR 96-3p, at *1. Hence, step two acts as a "*de minimis*
12 screening device to dispose of groundless claims." *Id.* Plaintiff has the burden of proving that
13 his "impairments or their symptoms affect [his] ability to perform basic work activities."
14 *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2001); *Tidwell v. Apfel*, 161 F.3d 599,
15 601 (9th Cir. 1998).

16 In addition to the five-step analysis outlined in 20 C.F.R. § 404.1520, the
17 Commissioner has promulgated additional regulations governing evaluations of the severity of
18 mental impairments. 20 C.F.R. § 404.1520a. When a claimant alleges that he or she has a
19 severe mental impairment, these regulations require application of a "special technique" at the
20 second and third steps of the five-step framework, *Schmidt v. Astrue*, 496 F.3d 833, 844 n. 4
21 (7th Cir. 2007), and at each level of administrative review. 20 C.F.R. § 404.1520a(a). "Under
22 the special technique, [the ALJ] must first evaluate [the claimant's] pertinent symptoms, signs,
23 and laboratory findings to determine whether [she has] a medically determinable mental
24

25 ³ Basic work activities include the abilities and aptitudes necessary to do most jobs
26 including walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, handling,
seeing, hearing, understanding, carrying out and remembering simple instructions, and dealing
with changes in a routine work setting. *See* 20 C.F.R. §§ 404.1521(b), 416.921(b).

1 impairment(s).” *Id.* § 404.1520a(b)(1). If the claimant is found to have such an impairment,
 2 the reviewing authority must “rate the degree of functional limitation resulting from the
 3 impairment(s) in accordance with paragraph (c),” § 404.1520a(b)(2), which specifies four
 4 broad functional areas: (1) activities of daily living; (2) social functioning; (3) concentration,
 5 persistence, or pace; and (4) episodes of decompensation. *Id.* § 404.1520a(c)(3). According to
 6 the regulations, if the degree of limitation in each of the first three areas is rated “none or
 7 mild,” and no episodes of decompensation are identified in the fourth area, then the reviewing
 8 authority generally will conclude that the claimant’s mental impairment is not “severe.” 20
 9 C.F.R. § 404.1520a(d)(1).

10 1. *Depressive Disorder*

11 The ALJ found that plaintiff’s only severe impairments were “HIV infection with
 12 medication side effects.” AR at 18. With respect to plaintiff’s alleged mental impairments, the
 13 ALJ asserted that “[t]he claimant’s medically determinable mental impairments of anxiety
 14 disorder, considered singly and in combination, do not cause more than minimal limitation in
 15 the claimant’s ability to perform basic mental work activities and are therefore nonsevere. In
 16 making this finding, I have considered the four broad functional areas set out in the disability
 17 regulations for evaluating mental disorders[.]” AR at 22. The ALJ concluded that “[b]ecause
 18 the claimant’s medically determinable mental impairments cause no more than ‘mild’
 19 limitation in any of the first three functional areas and ‘no’ limitation in the fourth area, they
 20 are nonsevere.” AR at 22. In other words, the ALJ found that plaintiff’s anxiety disorder has
 21 only a minimal effect on her ability to do basic work activities. 20 C.F.R. § 404.1520a(d)(1).
 22 The ALJ did not consider plaintiff’s diagnosed depressive disorder as part of this analysis,
 23 although plaintiff also alleged that her depression constituted a severe mental impairment. AR
 24 at 22-23, 56.

25 The Ninth Circuit has held that an ALJ’s failure to follow the 20 C.F.R. § 404.1520a
 26 technique requires reversal if the claimant has a “colorable claim of a mental impairment.”

1 *Selassie v. Barnhart*, 203 Fed.Appx. 174, 176 (9th Cir. 2006) (reaffirming its holding in
2 *Gutierrez* as it applies to the current version of 20 C.F.R. § 404.1520a and 416.920a, and
3 holding that “[t]he specific documentation requirements . . . are not mere technicalities that can
4 be ignored as long as the ALJ reaches the same result that it would have if it had followed
5 those requirements.”). For example, in *Selassie*, the Ninth Circuit reversed where “neither the
6 ALJ nor the Appeals Council engaged in any of the required analysis with regard to [the
7 claimant]’s diagnosed post traumatic stress disorder (“PTSD”).” *Id.* at 176.

8 In this case, plaintiff has a “colorable claim” that she suffers from depression. As the
9 Commissioner concedes, plaintiff was diagnosed with depression by her physicians and mental
10 health counselors as early as 2004. AR at 303-21, 431-35, 438, 451, 472, 478. In March 2004,
11 plaintiff was receiving counseling from Lisa Harmon, MS, MHC, and Douglas Benjamin, MS,
12 LMHC, for a generalized anxiety disorder and depression. AR at 303-21. In addition, Dr.
13 Ellen Walker Lind, Ph.D., who conducted a DSHS psychological exam of plaintiff in June
14 2005, reported that plaintiff’s memory difficulties “may be the result of depression and
15 anxiety” and “strongly encouraged [plaintiff] to continue meeting with her psychotherapist on
16 treatment of symptoms of anxiety and depression.” AR at 139. By September 2004, chart
17 notes indicate that plaintiff was taking an increased dose of Zoloft. AR at 277. Similarly, the
18 three Disability Determination Services (“DDS”) state agency medical consultants who
19 reviewed plaintiff’s case in August 2005 and January 2006 determined that plaintiff suffered
20 from a depressive disorder that should be considered “severe” under the Act. AR at 105, 108,
21 367-68. In April 2007, plaintiff’s treating physician, Scott Blaker, M.D., noted plaintiff’s
22 “history of depression” and prescribed Cymbalta. AR at 478. After plaintiff reported that she
23 did not notice any effect, Dr. Blaker increased the dosage in May 2007.⁴ AR at 478, 472.

24 ⁴ Although the ALJ did not acknowledge plaintiff’s allegations that she suffers from
25 depression at any point in his decision, he did acknowledge that plaintiff was taking an
26 antidepressant in May 2007. Specifically, in dismissing plaintiff’s gastrointestinal complaints
relating to her medication, the ALJ observed that “[i]n May of 2007 the claimant reported that
she was spending a lot of time with her boyfriend at the bar, but she was not noting any effect

1 Plaintiff stopped taking Cymbalta in November 2007, but was advised that she could resume
2 her treatment or try a different antidepressant medication at any time. AR at 431. Since
3 November 2007, plaintiff appears to have continued receiving mental health treatment for
4 “depression and anxiety” from Dr. Harmon. AR at 451.

5 Thus, the ALJ was obligated under the regulations to consider plaintiff’s depressive
6 disorder in making the requisite findings as to plaintiff’s degree of limitation in each of the
7 four functional areas, 20 C.F.R. § 404.1520a(c)(3), as well as “document application of the
8 technique in the decision.” *Id.* § 404.1520a(e). As the ALJ did not address plaintiff’s
9 depressive disorder in his decision, the Court has no basis to evaluate whether the ALJ
10 properly excluded plaintiff’s depression as a severe impairment. As a result, this case must be
11 remanded so that the ALJ can consider whether plaintiff’s depressive disorder, either singly or
12 in combination with plaintiff’s anxiety disorder, constitutes a severe mental impairment. On
13 remand, the ALJ should document his application of the “special technique” for evaluating the
14 severity of mental impairments, as required by 20 C.F.R. § 404.1520a.

15 2. *Migraines*

16 The ALJ also failed to make specific findings at step two regarding the severity of
17 plaintiff’s migraine headaches. AR at 18. In fact, the ALJ’s decision fails to mention the
18 medical evidence or substantial testimony in the record concerning plaintiff’s migraines,
19 except to point out that “doctors for the State Agency . . . noted that the claimant’s migraines
20 had been rare and treated with Percocet,” AR at 19, and to reject plaintiff’s boyfriend’s lay
21 witness testimony because “he attributes many of claimant’s limitations to migraines, while the
22 claimant takes no prophylactic migraine medication.” AR at 26. Thus, plaintiff correctly
23 argues that the ALJ also erred by failing to discuss the severity of plaintiff’s migraines.

24
25
26 from her antidepressant. Her doctor has told her that if she cuts down on her alcohol she might
improve the impact of her medication.” AR at 25.

1 The Ninth Circuit has held that an ALJ cannot simply ignore substantial evidence of an
2 alleged impairment in considering the combined effect of a claimant's impairments at step two.
3 *See Smolen*, 80 F.3d at 1290 (proving that an ALJ erred at step two by finding that a claimant
4 "suffer[ed] from only one severe impairment . . . [where] in so finding, the ALJ ignored
5 substantial and undisputed evidence of [the claimant]'s other impairments and failed to
6 consider how the combination of those impairments affected [the claimant]'s ability to do basic
7 work activities."). In this case, medical records from at least September 2004 indicate that
8 plaintiff has a "long history" of migraine headaches, and has been prescribed Percocet because
9 she obtains no relief from "Imitrex or Maxalt." AR at 276. For example, a December 2004
10 chart note from the Interfaith Clinic indicated that plaintiff has a history of migraines since age
11 15 with increasing frequency and intensity, and even Percocet is not always effective in
12 relieving the pain. AR at 266. The records also reflect that plaintiff was prescribed Percocet
13 again in May 2005 and 2007 to treat her migraines. AR at 216, 450. In light of the ALJ's
14 failure to evaluate the medical evidence of plaintiff's migraines, the Court has no basis to
15 evaluate whether the ALJ properly excluded the migraines as a severe physical impairment.

16 On remand, the ALJ should also consider whether plaintiff's migraines, either singly or
17 in combination with plaintiff's other impairments, constitute a severe physical impairment.
18 Here, the ALJ did not expressly take plaintiff's depressive disorder or migraines into account
19 in calculating plaintiff's RFC at step four. AR at 24. *See Lewis v. Astrue*, 498 F.3d 909, 911
20 (9th Cir. 2007) (ALJ's failure to list bursitis as severe at step two was harmless error where
21 ALJ considered functional limitations of bursitis at step four); *Burch*, 400 F.3d at 682, 684
22 (ALJ did not commit reversible error in not considering the claimant's obesity at step two
23 because the ALJ adequately considered the claimant's obesity in his RFC determination).
24 Accordingly, if the ALJ determines on remand that plaintiff's depressive disorder or migraines
25 constitute severe impairments, the ALJ should articulate how, if it all, these impairments affect
26 the ALJ's RFC determination.

1 B. On Remand, The ALJ Must Reevaluate The Pertinent Medical Evidence

2 1. *Standard of Review for Medical Evidence*

3 As a matter of law, more weight is given to a treating physician's opinion than to that
4 of a non-treating physician because a treating physician "is employed to cure and has a greater
5 opportunity to know and observe the patient as an individual." *Magallanes*, 881 F.2d at 751;
6 *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician's opinion,
7 however, is not necessarily conclusive as to either a physical condition or the ultimate issue of
8 disability, and can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881
9 F.2d at 751. If an ALJ rejects the opinion of a treating or examining physician, the ALJ must
10 give clear and convincing reasons for doing so if the opinion is not contradicted by other
11 evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725
12 (9th Cir. 1988). "This can be done by setting out a detailed and thorough summary of the facts
13 and conflicting clinical evidence, stating his interpretation thereof, and making findings." *Id.*
14 (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his
15 conclusions. "He must set forth his own interpretations and explain why they, rather than the
16 doctors', are correct." *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).
17 Such conclusions must at all times be supported by substantial evidence. *Reddick*, 157 F.3d at
18 725.

19 The opinions of examining physicians are to be given more weight than non-examining
20 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
21 uncontradicted opinions of examining physicians may not be rejected without clear and
22 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
23 physician only by providing specific and legitimate reasons that are supported by the record.
24 *Bayliss*, 427 F.3d at 1216.

25 Opinions from non-examining medical sources are to be given less weight than treating
26 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the

1 opinions from such sources and may not simply ignore them. In other words, an ALJ must
2 evaluate the opinion of a non-examining source and explain the weight given to it. SSR 96-6p,
3 1996 WL 374180, at *2. Although an ALJ generally gives more weight to an examining
4 doctor's opinion than to a non-examining doctor's opinion, a non-examining doctor's opinion
5 may nonetheless constitute substantial evidence if it is consistent with other independent
6 evidence in the record. *Thomas*, 278 F.3d at 957; *Orn*, 495 F.3d at 632-33.

7 *2. The ALJ's Treatment of the Opinions of Ellen Walker Lind, Ph. D.*

8 Plaintiff contends that the ALJ erred by affording "no weight" to the medical opinions
9 of examining psychologist Dr. Lind, who conducted a psychological evaluation of plaintiff on
10 June 2, 2005. AR at 131-39. Dr. Lind reported that she had reviewed "a Function Report -
11 Adult completed by Wendy Weitz, Case Manager," as well as "[c]hart notes dictated in 2004
12 by Lisa Harmon, M.S.," to obtain background information for her evaluation. AR at 136. In
13 addition, "Ms. Stone was interviewed for information about her history and functioning." AR
14 at 136.

15 Dr. Lind diagnosed plaintiff with dysthymic disorder, panic disorder without
16 agoraphobia, generalized anxiety disorder, and polysubstance dependence in sustained full
17 remission. AR at 139. Specifically, she found that plaintiff's "remote memory is reportedly
18 good, but recent memory is poor. She explained that she forgets appointments and things that
19 her parents tell her." AR at 138. On the Wechsler Memory Scale (WMS-III), plaintiff's
20 "memory skills are all average or above, with the exception of Working Memory, measuring
21 short-term immediate recall." AR at 138. In addition, "[r]esults of the Trail-Making Test
22 indicate that Ms. Stone functioned better than about 80 percent of others her age on Trails A
23 and better than 90 percent of others her age on Trails B, with one error on Trails B." AR at
24 139. Based upon the testing administered to plaintiff, Dr. Lind stated that plaintiff's "memory
25 difficulties are not evident through current testing and may be a result of depression and
26 anxiety. She is strongly encouraged to continue meeting with her psychotherapist on treatment

1 of symptoms of anxiety and depression.” AR at 129. With respect to plaintiff’s physical
2 symptoms, Dr. Lind reported that the “[p]rognosis for improvement of Ms. Stone’s symptoms
3 is guarded based on severity of physical concerns. She reported having headaches which
4 impact her several days a week and ongoing physical pain.” AR at 139. Finally, Dr. Lind
5 assessed plaintiff with a Global Assessment of Functioning (“GAF”) score of 41, which
6 indicates serious impairments.⁵ AR at 139.

7 The ALJ accorded “no weight” to Dr. Lind’s findings because “the claimant had told
8 Dr. Lind that she had stopped using drugs in July of 2002 when she clearly was using
9 marijuana and alcohol after that.” AR at 23. In addition, the ALJ found that “Dr. Lind stated
10 that the claimant’s prognosis was limited based on her physical concerns,” but “[t]his is not an
11 area of expertise for Dr. Lind and she was clearly accepting the claimant’s report of physical
12 symptoms without reviewing the medical evidence to see if they were supported.” AR at 23.

13 Plaintiff contends that the ALJ erred because “the ALJ failed to give specific and
14 legitimate reasons, supported by substantial evidence, for rejecting the opinions of this
15 examining doctor.” Dkt. 13 at 13. Plaintiff asserts that contrary to the ALJ’s assertions, “the
16 psychologist clearly did not base her opinions of Plaintiff’s mental impairments and limitations
17 primarily on Plaintiff’s statements, or a misperception of Plaintiff’s use of marijuana or
18 alcohol.” *Id.* at 14. The Commissioner responds that “the ALJ properly considered all of the
19 medical evidence” in this case. Dkt. 15 at 3.

20 The Court finds plaintiff’s arguments persuasive. As mentioned above, Dr. Lind stated
21 at the outset of her evaluation that she had reviewed plaintiff’s medical records from therapy,
22 including Dr. Harmon’s chart notes indicating “that in August of 2004 [the plaintiff] used

23
24 ⁵ The GAF score is a subjective determination based on a scale of 1 to 100 of “the
25 clinician’s judgment of the individual’s overall level of functioning.” AMERICAN PSYCHIATRIC
26 ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32-34 (4th ed. 2000).
A GAF score of 41-50 indicates “[s]erious symptoms,” such as suicidal ideation or severe
obsessional rituals, or “any serious impairment in social, occupational, or school functioning,”
such as the lack of friends and/or the inability to keep a job. *Id.* at 34.

1 marijuana and alcohol daily during a trip to Texas.” AR at 136. Thus, the ALJ’s assertion that
2 Dr. Lind mistakenly relied upon the claimant’s statement that she stopped using drugs in July
3 2002 was not supported by the record. AR at 23. In addition, because the ALJ failed to
4 discuss the medical evidence of plaintiff’s migraines in this case, the Court has no basis to
5 determine whether the ALJ properly considered Dr. Lind’s findings regarding plaintiff’s
6 headaches before discounting them. Even if the ALJ’s stated reasons for affording no weight
7 to Dr. Lind’s findings regarding plaintiff’s “physical concerns” or symptoms were specific and
8 legitimate, he failed to provide any reasons for rejecting Dr. Lind’s psychological diagnoses
9 and prognosis – a subject within Dr. Lind’s area of expertise and the focus of her evaluation.
10 For example, the ALJ failed to acknowledge or discuss Dr. Lind’s assessed GAF score of 41,
11 or her diagnosis of dythmic disorder, panic disorder, and generalized anxiety disorder. On
12 remand, the ALJ is directed to reevaluate Dr. Lind’s medical opinion and assessed GAF score,
13 after also taking into consideration the medical evidence concerning plaintiff’s depression and
14 migraines.

15 3. *The ALJ’s Treatment of the State Agency Medical Consultants’ Opinions*

16 Plaintiff contends that the ALJ also erred in this case by failing to provide valid reasons
17 for disregarding the opinions of the DDS state agency medical consultants, who considered
18 plaintiff’s anxiety and depressive disorders to be “severe” within the meaning of the Act. Dkt.
19 13 at 10-13. The Commissioner responds that the ALJ engaged in “a proper analysis,” as he is
20 not bound by the state agency medical consultants’ opinions. Dkt. 15 at 6.

21 ALJs are obligated to consider the opinions of non-examining state agency physicians
22 that relate to the nature and severity of an impairment, or whether a claimant meets or equals a
23 listing. 20 C.F.R. § 404.1527(f)(2)(ii), 416. 927(f)(2)(ii). These opinions, however, are
24 entitled to less weight than treating or examining doctors. *Lester v. Chater*, 81 F.3d 821, 830
25 (9th Cir. 1995) (internal citation omitted). An ALJ must evaluate the opinion of a non-
26 examining source, and must explain the weight he assigns it. *See* SSR 96-6p.

1 In August 2005, Timothy Gregg, Ph.D., reviewed plaintiff's medical records for the
2 Commissioner, and determined that plaintiff has an anxiety related disorder that can be
3 evaluated under listing 12.06 as well as a depressive disorder that can be evaluated under
4 listing 12.04. AR at 105, 108, 110. When assessing the impact of claimant's depression and
5 anxiety upon the four essential areas of function, Dr. Gregg found that plaintiff's
6 concentration, persistence, or pace were "moderately limited," which indicates that her mental
7 impairments were "severe" within the meaning of the Act. AR at 115. Specifically, he found
8 that due to plaintiff's psychologically based symptoms, plaintiff's ability to complete a normal
9 workday and workweek and to perform at a consistent pace without an unreasonable number
10 and length of rest periods was "moderately limited." AR at 128. In his mental residual
11 functional capacity assessment, Dr. Gregg explained that "[t]he claimant's allegations are
12 partially credible in that she has been diagnosed with mental impairment. However, her
13 functional limitations do not meet listing level criteria." AR at 129. In contrast, Dr. Gregg
14 characterized plaintiff's credibility with respect to her alleged physical limitations as "poor,"
15 because plaintiff was physically able to travel to Pennsylvania to smoke marijuana with a
16 friend. AR at 126. State agency consultants Robert G. Hoskins, MD, and Thomas Clifford
17 both affirmed Dr. Gregg's assessment as written in January 2006. AR at 367-68.

18 The ALJ stated that "[t]he State Agency physicians found a severe mental impairment,
19 but in reviewing the limitations they set forth . . . there was no real limitation that would
20 impact the claimant's ability to work." AR at 23. For example, although "the claimant is in
21 counseling, the counseling notes indicate that the main problem addressed is typical parenting
22 problems in dealing with her daughter." AR at 23. In addition, "the claimant has reported that
23 she had not had a panic attack for years. There have been times that she did not go to
24 counseling because she was too busy." AR at 23. Finally, the ALJ noted that it appears that
25 counseling has helped ensure plaintiff's compliance with treatment, but "she may be more
26 reliable with her medication now that she is living with her boyfriend." AR at 23.

1 Here, the ALJ failed to provide specific and legitimate reasons for rejecting the state
2 agency medical consultants' opinions that plaintiff's mental impairments were severe. AR at
3 23. For example, the ALJ did not point to any medical evidence in the record to rebut Dr.
4 Gregg's finding that plaintiff's concentration, persistence, and pace were "moderately limited,"
5 or that plaintiff's anxiety and depressive disorders would prevent her from completing a
6 normal work week without an unreasonable number and length of rest periods due to her
7 psychological symptoms. AR at 115, 128. *See* 20 C.F.R. § 416.920a(d)(1) (providing that
8 mental impairments can only be found non-severe if they cause no more than "mild" limitation
9 in any of the first three functional areas and there are no incidents of decompensation).
10 Contrary to the ALJ's assertion, an inability to complete a normal work week without an
11 unreasonable number and length of rest periods "would impact the claimant's ability to work."
12 AR at 23. Especially in light of the ALJ's failure, once again, to acknowledge or discuss
13 plaintiff's diagnosed depressive disorder, the ALJ's conclusory assertions are insufficient to
14 rebut the consultants' findings. Similarly, the ALJ's statements that plaintiff was receiving
15 psychological counseling to address parenting concerns and ensure compliance with treatment
16 ignored the substantial evidence in the record, discussed above, that plaintiff was also
17 receiving counseling to treat her anxiety and depression. On remand, the ALJ is directed to
18 reevaluate the state agency medical consultants' medical opinions, and expressly take into
19 consideration plaintiff's diagnosis and treatment for her anxiety and depressive disorders.

20 D. On Remand, The ALJ Must Reevaluate Plaintiff's RFC

21 An RFC is the "maximum degree to which [a plaintiff] retains the capacity for
22 sustained performance of the physical-mental requirements of jobs." 20 C.F.R. 404, Subpt. P,
23 App. 2 §200(c). It is an administrative decision as to the most a plaintiff can do, despite her
24 limitations. SSR 96-8p. The ALJ must assess all of the relevant evidence, including evidence
25 regarding symptoms that are not severe, to determine if the claimant retains the ability to work
26

1 on a “regular and continuing basis,” *e.g.*, eight hours a day, five days a week. *Reddick*, 157
2 F.3d at 724; *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995); SSR 96-8p.

3 As discussed above, the ALJ erred at step two in this case by failing to acknowledge or
4 consider plaintiff’s alleged depressive disorder and migraines. Similarly, in assessing
5 plaintiff’s RFC, the ALJ made no specific finding regarding whether plaintiff’s depressive
6 disorder or migraines constituted medically-determinable impairments, or had any effect on
7 plaintiff’s ability to work. The ALJ’s passing statement that plaintiff “demonstrates no
8 significant treatment for mental impairments” despite the substantial evidence in the record of
9 plaintiff’s treatment for both anxiety and depressive disorders, was insufficient to cure this
10 error. AR at 25. *See also Smolen*, 80 F.3d at 1290 (providing that where the ALJ erred in
11 finding that a claimant suffered from only one “severe” impairment at step two, the ALJ also
12 failed to consider at step five how the combination of her other impairments affected her
13 residual functional capacity to perform work.). Upon remand, the ALJ should reevaluate
14 plaintiff’s RFC evaluation to reflect any limitations from plaintiff’s depressive disorder and
15 migraines.

16 E. On Remand, The ALJ Must Reevaluate Plaintiff’s Credibility

17 Plaintiff alleges that the ALJ erred by failing to provide clear and convincing evidence
18 for rejecting her testimony. Specifically, plaintiff contends that the ALJ “failed to properly
19 consider the issue of whether Plaintiff’s migraines were severe within the meaning of the Act
20 [at step two,] and when he failed to give proper, supported reasons to reject Plaintiff’s
21 testimony about limitations from her migraines.” Dkt. 16 at 4.

22 A determination of whether to accept a claimant’s subjective symptom testimony
23 requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen v. Chater*, 80 F.3d 1273,
24 1281 (9th Cir. 1996); Social Security Ruling (“SSR”) 96-7p. First, the ALJ must determine
25 whether there is a medically determinable impairment that reasonably could be expected to
26 cause the claimant’s symptoms. 20 C.F.R. §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at

1 1281-82; SSR 96-7p. Once a claimant produces medical evidence of an underlying
2 impairment, the ALJ may not discredit the claimant's testimony as to the severity of symptoms
3 solely because they are unsupported by objective medical evidence. *Bunnell v. Sullivan*, 947
4 F.2d 341, 343 (9th Cir. 1991) (en banc); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1988).
5 Absent affirmative evidence showing that the claimant is malingering, the ALJ must provide
6 "clear and convincing" reasons for rejecting the claimant's testimony. *Smolen*, 80 F.3d at
7 1284; *Reddick*, 157 F.3d at 722.

8 When evaluating a claimant's credibility, the ALJ must specifically identify what
9 testimony is not credible and what evidence undermines the claimant's complaints; general
10 findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may
11 consider "ordinary techniques of credibility evaluation" including a reputation for truthfulness,
12 inconsistencies in testimony or between testimony and conduct, daily activities, work record,
13 and testimony from physicians and third parties concerning the nature, severity, and effect of
14 the symptoms of which he complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec.*
15 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

16 Here, the ALJ found that "the claimant's medically determinable impairment could
17 reasonably be expected to produce some of her alleged symptoms, but . . . the claimant's
18 statements concerning the intensity, persistence and limiting effects of these symptoms are not
19 entirely credible. AR at 25. As the plaintiff correctly argues, however, the ALJ did not
20 provide any clear and convincing reasons to disregard plaintiff's testimony regarding the
21 severity of her migraines. As noted above, the ALJ failed to mention plaintiff's migraines in
22 his decision, except to point out at step two that "doctors for the State Agency . . . noted that
23 the claimant's migraines had been rare and treated with Percocet," AR at 19, and to reject
24 plaintiff's boyfriend's testimony on the grounds that "he attributes many of claimant's
25 limitations to migraines, while the claimant takes no prophylactic migraine medication." AR
26 at 26. In light of the substantial evidence in the record that plaintiff has been prescribed

1 Percocet because prophylactic migraine medication was ineffective, and even Percocet is
2 frequently ineffective in treating her pain, these are not clear and convincing reasons to
3 disregard plaintiff's testimony. AR at 19, 126, 136-37.

4 Because this case is being remanded for reconsideration of the medical evidence, and
5 the Court has found that credibility determinations are inescapably linked to conclusions
6 regarding medical evidence, 20 C.F.R. § 404.1529, the ALJ's credibility finding is also
7 reversed and the issue remanded. After re-evaluating the medical evidence of record, the ALJ
8 will be in a better position to evaluate the plaintiff's credibility. On remand, the ALJ should
9 properly assess plaintiff's testimony, and provide clear and convincing reasons for rejecting it
10 should such a conclusion be warranted.

11 Furthermore, the Court notes that it is evident from the opinion that the ALJ focused on
12 plaintiff's alcohol and marijuana use as a basis for concluding that plaintiff was not entitled to
13 benefits. For example, the ALJ stated that plaintiff "significantly understated her alcohol use
14 at the hearing, detracting from her credibility and making [the ALJ] suspect that [plaintiff's]
15 marijuana use is also continuing." AR at 25. With respect to plaintiff's "chronic problems
16 with gastrointestinal complaints relating to her medication," the ALJ asserted that "the
17 evidence suggests that she drinks up to a six pack of beer a day, and that this may well be a
18 cause of her nausea." AR at 25. Moreover, the ALJ noted that "in May of 2007 the claimant
19 reported that she was spending a lot of time with her boyfriend at the bar, but was not noting
20 any effect from her antidepressant. Her doctor has told her that if she cuts down on her alcohol
21 she might improve the impact of her medication." AR at 25. Despite the ALJ's concerns
22 regarding plaintiff's drug and alcohol use, he did not conduct a Drug and Alcohol Analysis
23 ("DAA")⁶ relating to the plaintiff. On remand, if the ALJ believes that a DAA is appropriate,
24 then an analysis should also be included.

25 ⁶ Pursuant to the Contract with America Advancement Act, an "individual shall not be
26 considered to be disabled for purposes of [Title II and Title XVI benefits] if alcoholism or drug
addiction would (but for this subparagraph) be a contributing factor material to the

F. On Remand, The ALJ Must Reevaluate The Lay Witness Testimony

Plaintiff argues that “the ALJ failed to give legitimate, germane reasons to discredit the lay witness testimony” of plaintiff’s boyfriend, Joseph Cameron, and sixteen-year-old daughter, Michaela Stone. Dkt. 16 at 1. Plaintiff contends that if the lay witness testimony in this case had been properly credited by the ALJ, “it would have constituted additional proof of Plaintiff’s limitations from migraines and pain, which would have require a different disability determination by ALJ Dethloff.” Dkt. 13 at 22. The Commissioner failed to address this claim in his briefing. *See* Dkt. 15.

Lay witness testimony as to a plaintiff’s symptoms or how an impairment affects one’s ability to work is competent evidence that cannot be disregarded without comment. 20 C.F.R. §§ 404.1513(d)(4), 416.913(d)(4); *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993). To discount lay witness testimony, the ALJ must “provide reasons germane to each witness.” *Id.*

During the administrative hearing, Mr. Cameron and Ms. Stone both testified regarding the nature and extent of plaintiff’s impairments. AR at 715-34. Although the ALJ considered both witnesses’ lay testimony, he did “not find the testimony particularly credible.” AR at 26. With respect to Mr. Cameron’s testimony, the ALJ observed that he “apparently both opens and closes the store he works at so he is not home much of the time. He has only known the claimant for eight months . . . [and] attributes many of the claimant’s limitations to migraines, while the claimant takes no prophylactic migraine medication.” AR at 26. With respect to Ms. Stone’s testimony, the ALJ noted that “the claimant’s daughter indicates that the

Commissioner’s determination that the individual is disabled.” Pub. L. No. 104-121, 110 Stat. 847 (March 19, 1996) (codified at 42 U.S.C. 423(d)(2)(C), 1382c((a)(3)(J)). Before applying this statute, however, an ALJ must first conduct the five-step sequential-evaluation process and conclude that the claimant is disabled. *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). If a claimant is found to be disabled and there is medical evidence of plaintiff’s DAA use, then the ALJ must apply the sequential-evaluation process a second time to determine whether plaintiff would still be disabled if he or she stopped using drugs and alcohol. *Id.* It is error for an ALJ to conclude that DAA precludes an award of benefits prior to applying the five-step process first. *Id.*

1 claimant may scream in pain. This has not been observed by her counselor or any physician.
2 She has not observed the claimant with any supposed seizures.” AR at 26.

3 The ALJ’s reasons for rejecting plaintiff’s boyfriend’s testimony are neither legitimate
4 nor germane. Contrary to the ALJ’s assertion that Mr. Cameron had only known plaintiff for
5 eight months, Mr. Cameron testified that he had “known her for almost three years” and they
6 had been living together for eight months at the time of the administrative hearing. AR at 715.
7 Although Mr. Cameron works long hours, he testified extensively regarding his personal
8 observations of plaintiff’s symptoms, including how he knew when plaintiff was experiencing
9 a migraine. AR at 716-17. Furthermore, the ALJ’s rejection of Mr. Cameron’s testimony
10 concerning the severity of plaintiff’s migraines based upon the lack of corroborating evidence
11 in the medical record was erroneous under the Ninth Circuit’s decision in *Bruce v. Astrue*. 557
12 F.3d 1113, 1116 (providing that an ALJ may not discredit “lay testimony as not supported by
13 medical evidence in the record.”). *See also Smolen*, 80 F.3d 1273, 1289 (9th Cir. 1996) (“The
14 rejection of the testimony of [the claimant’s] family members because [the claimant’s] medical
15 records did not corroborate her fatigue and pain violates SSR 88-13, which directs the ALJ to
16 consider the testimony of lay witnesses where the claimant’s alleged symptoms are
17 *unsupported* by her medical records.”).

18 Similarly, it was improper under *Bruce* for the ALJ to reject Ms. Stone’s testimony that
19 she has witnessed her mother scream in pain on the grounds that it was not supported by the
20 medical evidence in the record. AR at 26. The ALJ’s assertion that Ms. Stone “has not
21 observed the claimant with any supposed seizures” is also an inaccurate characterization of Ms.
22 Stone’s testimony. When Ms. Stone was asked whether she ever witnessed her mom having
23 any kind of “spell or a blackout, and not be able to talk to you or respond to you,” Ms. Stone
24 responded, “Probably a lot. Last time she had something of a blackout, she was getting up and
25 walking, she had to hold herself against the wall . . . She couldn’t talk for a couple of seconds
26

1 . . . and she said I've got dizzy . . . her eyes will get wide, and she'll just kind of stop and . . .
2 she can't move, obviously." AR at 733.

3 The ALJ also discounted the testimony of Mr. Cameron and Ms. Stone based on the
4 fact that "[a]s they all share a household, they would all benefit if the claimant were awarded
5 benefits." AR at 26. However, "[i]f the desire or expectation of obtaining benefits were by
6 itself sufficient to discredit a claimant's testimony, then no claimant (or their spouse, or
7 friends, or family) would ever be found credible." *Ratto v. Secretary, Dept. of Health and*
8 *Human Servs.*, 839 F. Supp. 1415, 1429 (D. Or. 1993). Indeed, under the logic employed by
9 the ALJ in this case, few third-party witnesses could provide probative testimony. *See Dodrill*,
10 12 F.3d at 919 (providing that testimony from lay witnesses who see the claimant every day is
11 of particular value because "[a]n eye witness can often tell whether someone is suffering or
12 merely malingering . . . this is particularly true of witnesses who view the claimant on a daily
13 basis.").

14 Finally, the ALJ's observed that "[t]he claimant's drinking was largely ignored in the
15 testimony despite the evidence that she drinks as much as a six pack of beer a day." AR at 26.
16 Without more, however, this is an insufficient reason to discount the testimony of Mr.
17 Cameron and Ms. Stone. The ALJ did not ask Mr. Cameron about plaintiff's alcohol
18 consumption, and therefore his testimony did not conflict with any evidence in the record
19 regarding plaintiff's drug or alcohol use. When the ALJ asked Ms. Stone whether plaintiff had
20 been drinking when she experienced a "spell or a blackout," Ms. Stone did not deny that
21 plaintiff routinely drank alcohol, but stated, "No, not usually. Usually it's about the middle of
22 the day." AR at 734.

23 Thus, the ALJ failed provide sufficient reasons to discredit the testimony of Mr.
24 Cameron or Ms. Stone. On remand, the ALJ is directed to reconsider his findings with respect
25 to these lay witnesses, who have daily contact with the plaintiff and are in a position to convey
26 a complete picture of her ability to function.

1 G. The ALJ May Have Erred By Failing To Elicit Vocational Expert Testimony

2 Plaintiff contends that the ALJ erred by relying upon the Medical-Vocational
3 Guidelines (“the Guidelines”), although plaintiff’s mental impairments of anxiety and
4 depressive disorders also impose nonexertional limitations. Dkt. 13 at 23. In addition, plaintiff
5 asserts that her migraine headaches, HIV infection, and medication side-effects also imposed
6 nonexertional limitations on plaintiff’s ability to complete a work-day or workweek without an
7 unreasonable number or length of breaks. *Id.* at 23-24. Plaintiff asserts that the ALJ should
8 have instead solicited testimony from a Vocational Expert (“VE”) at the hearing. *Id.* at 22-25.

9 The ALJ may rely on the Guidelines “only when the grids accurately and completely
10 describe the claimant’s abilities and limitations.” *Tackett v. Apfel*, 180 F.3d 1094, 1102 (9th
11 Cir. 1999) (internal quotation marks and citations omitted). That is, when nonexertional
12 impairments limit a claimant’s functional capacity in ways not contemplated by the Guidelines,
13 the Guidelines are inapplicable. *Id.* However, the Guidelines are inapplicable only if a
14 claimant’s nonexertional limitations are “sufficiently severe” so as to significantly limit the
15 range of work permitted by the claimant’s exertional limitations. *See Hoopai v. Astrue*, 499
16 F.3d 1071, 1075 (9th Cir. 2007). In other words, if the claimant’s nonexertional limitations do
17 not significantly erode the pertinent occupational base, the ALJ may rely upon the Guidelines
18 as a framework. *See SSR 83-12*, 1983 WL 31253; *SSR 83-14*, 1983 WL 31254, at *3 (“A
19 particular . . . nonexertional limitation may have very little effect on the range of work
20 remaining that an individual can perform. The person, therefore, comes very close to meeting
21 a table rule which directs a conclusion of “Not disabled.”).

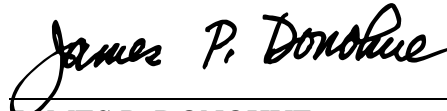
22 Here, because the ALJ did not properly consider all of the medical evidence, it follows
23 that the ALJ may have erred by relying upon the Guidelines. Accordingly, on remand, the ALJ
24 shall reevaluate whether to obtain VE testimony after reevaluating the pertinent medical
25 evidence and, if applicable, revising plaintiff’s RFC. The ALJ shall then determine whether
26 plaintiff’s nonexertional limitations are “sufficiently severe” so as to significantly limit the

1 range of work permitted by plaintiff's exertional limitations. If so, the ALJ shall solicit
2 testimony from a VE at a new hearing.

3 VIII. CONCLUSION

4 For the foregoing reasons, the Court recommends that this case be REVERSED and
5 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's
6 instructions. A proposed order accompanies this Report and Recommendation.

7 DATED this 26th day of November, 2010.

8 
9 JAMES P. DONOHUE
10 United States Magistrate Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26